

Sound Transit/WSDOT Re-Alignment Issue Paper No. 23

TOPIC:	Endangered Species Act (ESA) Compliance
ACTION TEAM SPONSOR:	Environmental Action Team
PRIMARY AUTHOR(S):	Sheila North (FTA)
APPLICABLE PROJECTS:	All Sound Transit joint FHWA/FTA Lead Agency and FTA Sole Lead Projects, may apply to FHWA Sole Lead
ISSUE:	For projects that involve FHWA/FTA as co-leads, how is ESA Compliance to be delegated and implemented?
DATE APPROVED:	January 26, 2001

BACKGROUND:

Section 7 of the Endangered Species Act (ESA) generally requires federal agencies to ensure that any action they authorize or fund is not likely to jeopardize the continued existence of any endangered or threatened species or the critical habitat of such species. Section 7 also requires federal agencies to consult with the Secretary of the Interior if an agency action is likely to affect a listed species or designated critical habitat.

FHWA (through WSDOT) and FTA do not always have the same process for ensuring compliance with ESA. In particular, FTA and FHWA have sometimes had different approaches to coordinating Section 7 requirements with review under the National Environmental Policy Act (NEPA). Consequently, where FTA and FHWA are co-leads, project proponents have been uncertain of the process and timing required to comply with these two statutes.

DECISION:

It was determined that for any Sound Transit project involving FTA as lead or co-lead (including FTA/FHWA co-lead projects), or for other projects as agreed by FTA and FHWA, ESA clearance shall occur according to FTA guidelines and procedures. This was agreed upon by all EAT members.

With that understanding, the following outlines FTA's approach for ESA compliance/Section 7 consultation requirements and for coordinating ESA compliance with NEPA (as modified to address FHWA/WSDOT coordination):

1. ST determines species lists/critical habitat in coordination with resource agencies. USFWS provides all current species and critical habitat listings for terrestrial/freshwater species; NMFS provides listings for marine/anadromous species. Candidate or proposed species lists may also be provided but are not required under ESA Section 7.
 2. ST prepares ESA Checklist and NEPA Worksheet. To be completed by ST at the outset of a project. If species lists are provided for the project area but no impact on species is expected to occur, completion of the ESA checklist screens out such "no-effect" projects early in the process. NEPA worksheet determines the scope of environmental review (CE, EA, or EIS).
 3. FTA determines if biological analysis is needed. Based on the ESA checklist, FTA determines whether further biological analysis is required. If the checklist demonstrates no effect on listed species or habitat AND if the project does not involve major construction then ST/WSDOT/FTA/FHWA can make a no effect determination. This ends the consultation process for the project and does not require NMFS/USFWS concurrence. FTA will send a letter to the Services notifying them of the no effect determination. FHWA, WSDOT, and ST will be copied on the letter. However, if more information is needed or the checklist indicates a potential effect, a Biological Assessment (BA) must be prepared by ST. ST will provide a recommended "effects determination" in the BA and will coordinate with WSDOT in making this determination. Upon completion of the BA, ST will distribute copies to FTA, WSDOT and FHWA, concurrently, for their review. WSDOT will coordinate with FHWA and, at their discretion, will provide any comments they and FHWA may have to FTA. FTA will take these comments into consideration and forward any necessary revisions to ST's ESA coordinator. If there are substantial issues as a result of comments received, FTA may request a meeting with FHWA, WSDOT, and ST to attempt to resolve them before finalizing the BA.
- (NOTE: The BA only needs to consider the NEPA preferred alternative. In addition, the level of design detail will be project-specific according to FTA policy.)
4. FTA initiates informal consultation. During preparation of a BA, FTA, with assistance from ST, will coordinate with NMFS/USFWS and begin informal consultation regarding potential effects on listed species or habitat. The consultation will be conducted with ST's NMFS reviewer while such arrangement between ST and NMFS is in place, unless circumstances warrant the consultation to proceed with other NMFS staff.
 5. FTA makes effects determination. Based on the BA and informal consultation, FTA will make a determination whether the project is or is not likely to adversely effect listed species or habitat (may affect not likely to adversely affect, likely to adversely affect). If

the project is not likely to have an adverse effect (may affect not likely to adversely affect), FTA will request concurrence from NMFS and/or USFWS. Once concurrence is received, the consultation process is completed for the project. However, if FTA or NMFS/USFWS determine that the project is likely to have an adverse effect, formal consultation must begin.

(NOTE: It is FTA's responsibility to notify WSDOT/FHWA should consultation lead to conservation measures that may affect highway or WSDOT Right of Way (ROW).)

6. FTA conducts formal consultation. During formal consultation, FTA/FHWA will work directly with NMFS/USFWS to formulate a Biological Opinion and incidental take statement. ST will assist FTA as appropriate during the consultation process. FTA, with ST's assistance, also will keep FHWA/WSDOT apprised of the status of the consultation and will notify them should issues arise during the consultation that could affect their interests.
7. FTA/FHWA issues environmental determination. Once the consultation process is completed (i.e. the project has received either a no effect determination or a concurrence from NMFS/USFWS that it is not likely to have an adverse effect or a Biological Opinion/incidental take statement is issued), FTA/FHWA will issue an environmental determination (i.e., FONSI or ROD). FTA/FHWA will incorporate any findings and mitigation commitments from the consultation process into the environmental documentation and determination.

If ESA compliance is not possible prior to environmental determination:

- As indicated by the above process, standard FTA procedure states that the ESA consultation is to be completed prior to issuance of environmental determination. However, in the specific case that NMFS or USFWS requires final design stage for consultation completion, or in cases where a project will be significantly delayed without immediate environmental determination, FTA reserves the right to issue an environmental determination (i.e., FONSI or ROD) while the ESA process is still pending.

For FTA to alter its ordinary process, ST must provide FTA with reasonable assurance that ESA requirements will be satisfied. FTA will then act on the request for accelerated NEPA determination. For co-lead projects where FTA is the lead for ESA compliance, FHWA will defer to FTA's determination as to whether reasonable assurance has been provided and whether it is appropriate to issue the NEPA determination.

Until all necessary concurrences or biological opinions are received from the Services, no project activities will be allowed to occur that could cause an irreversible or irretrievable commitment of resources, or in other ways limit the development or implementation of alternatives identified through the ESA consultation. This includes any activities that

involve ground disturbance, such as geotechnical drilling or Phase II site investigations. It could also include final design, PS&E, or real estate acquisition. If ST wishes to proceed with such activities while the ESA consultation is pending, it may request special permission to do so from FTA and demonstrate that such activities will have no effect on listed species or the consultation. **Even if special permission is given, construction, construction-related, and pre-construction activities will be prohibited until ESA consultation is complete.** Case-specific parameters shall be developed so that no irreversible or irretrievable commitment of resources shall occur prior to completion of consultation. When ESA consultation has been completed, FTA will confirm that the NEPA document and determination adequately addresses all consultation issues. FTA may at that time request more NEPA documentation, if necessary.

8. FTA awards grant or FHWA authorizes ROW or construction funding. **This can occur only when NEPA, ESA, and all other required processes are complete.** Conservation measures identified through the consultation process for avoiding or minimizing impacts to listed species or critical habitat could be included in the final grant or construction funding award.

**ENVIRONMENTAL ACTION TEAM DECISION ON ISSUE PAPER NO. 23:
ESA COMPLIANCE**

AGREED TO ON JANUARY 26, 2001 BY:



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